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No. 09-745

In The

Supreme Court of the United States

DENNIS ANDREWS, TIM KAUFMANN, SAUL WEINSTEIN, NOBERTO BERCASIO, FRED COFFEY, EVAN FERMAINT, RONALD PROHASKA AND EDWARD BYRNE,
Petitioners,

v.

ROGER FAIRLEY AND RICHARD GACKOWSKI,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether the doctrine of Prior Restraint makes actionable harassment or physical "threats of punishment" alleged to have been made to "discourage future speech."

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Seventh Circuit.

The petitioners here are Dennis Andrews, Tim Kaufmann, Saul Weinstein, Noberto Bercasio. Fred Coffey, Evan Fermaint, Ronald Prohaska and Edward Byrne. Each was an appellee below.

The respondents here and appellants below are Roger Fairley and Richard Gackowski.

The following parties were defendants in the district court action but did not participate in the appeal to the United States Court of Appeals for the Seventh Circuit: Patrick Loizon, Gregory Ernst, Gabriel Ochoa, Juan Diaz, Michael Sheahan, and Cook County.

The Sheriff of Cook County, Thomas Dart, was an appellee below, but is not a petitioner.

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PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Seventh Circuit Court of Appeals is reported at 578 F.3d 518 (7th Cir. 2009). App., *infra*, 1a-16a.

JURISDICTION

The district court had jurisdiction of this case under 28 U.S.C. § 1331. The court of appeals held that it had jurisdiction to review the district court's order under 28 U.S.C. § 1291. (578 F.3d at 522) The court of appeals' judgment was entered on August 20, 2009. A timely petition for rehearing was filed on September 3, 2009. (App., *infra*, 50a) The petition was denied on September 21, 2009. (*Id.*) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides, in relevant part: "Congress shall make no law . . . abridging the freedom of speech. . . ."

Title 42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the

> jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

STATEMENT OF THE CASE

Respondents, Roger Fairley and Richard Gackowski, two former correctional officers at the Cook County (Illinois) Department of Corrections, claim that they were "compelled" to quit their jobs due to on-the-job harassment they say was directed at (1) preventing them from reporting to their superiors officer-on-inmate abuses they claim to have witnessed; and (2) "discouraging" their future testimony in a lawsuit that had been brought by present and former inmates against various of their fellow officers.

Petitioners have denied the allegations and contested their veracity at every stage of the litigation. After a series of pre-trial rulings that they believed adverse to their case, Respondents requested that summary judgment be entered against them. The appeal underlying this Petition followed, resulting in the reversal of the district court's judgment order "[t]o the extent that it dismissed the [plainitffs'] prior-restraint claim." 578 F.3d at 526.

I. Factual Background

Plaintiffs, Roger Fairley and Richard Gackowski, were formerly employed as correctional officers at the

Cook County Department of Corrections. (R. 447-1)[1] Each of the Defendants were also employed in various capacities at the Cook County Department of Corrections. (R. 257)

Fairley and Gackowski both allege that they were harassed, teased and physically assaulted while at work by Petitioners Bercasio and Fermaint, two of their fellow correctional officers. (*Id.*) Fairley alleges that another of his former fellow correctional officers, Petitioner Coffey, threatened "to beat him up" in "late 1998 or early 1999" and "warned" him in "October or November 2002 . . . that officers who tell on other officers 'usually get met in the parking lot.'" (*Id.* at ¶49) Fairley further alleges that Petitioner Byrne denied him paternity leave and overtime pay and ignored a request for back up. (*Id.* at ¶¶ 43, 50) and that Petitioner Andrews, the Superintendent of the Division, "failed to ensure [his] assignments were being rotated properly." (*Id.* at ¶¶ 39, 43) Gackowski alleges that Andrews "threatened to sue him for slander" (*Id.* at ¶ 56) and that Defendant Weinstein "stalled [an] investigation" into his internal complaints. (*Id.* at ¶ 57)

Both Fairley and Gackowski ascribe the motive for the complained of actions as their having been witness to officer-on-inmate violence, and their subsequent willingness to testify in favor of certain inmate-plaintiffs in a civil lawsuit, *Fields v. Byrne,* No. 00 L 9339 (Cir. Ct. Cook County filed Aug. 16, 2000) (hereafter "*Fields*"). (*Id.* at ¶¶ 37-51 52-62)

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[1] Reference to "R." is to the number assigned by the clerk on the civil docket.

The *Fields* case arose from an altercation between correctional officers and inmates in a section of the jail known as "Special Incarceration Unit 2," or "SI-2." (*Id.* at ¶ 28) The resulting lawsuit named Petitioners Fermaint, Bercasio and Byrne as defendants, together with the Executive Director of the jail, the then-Superintendent of the Division housing "SI-2," a Correctional Captain, two Correctional Sergeants, and twelve other correctional officers – none of whom are parties to this suit. (*Id.* at ¶ 34).

In December 2002 Fairley received a subpoena to testify in the *Fields* case. Later that month, Fairley claims an inmate attacked him with a shank, cutting him on the wrist. He theorizes that one or more of the defendants to the suit provoked the inmate to attack him. (R. 553-1) The States Attorney's Office never brought criminal charges against the inmate for his assault on Fairley. (R. 447-1) Fairley claims that Bercasio later remarked: "You see that, Fairley? You **** with people, that's how you get stabbed." (578 F.3d at 520)

Prior to Fairley's subpoenaed deposition, Gackowski testified that Petitioner Prohaska threatened both he and Fairley, saying, "[I]f Fairley goes into court on this SI-2 case ... and tells the truth, he will **** everyone involved.... We always knew he was a weak link and when a weak link can **** everyone in the chain, then we have to bury the weak link. It's nothing personal. It's just business.... Just like with your complaint trying to **** fellow officers." (578 F.3d at 521)

On January 9, 2003, Gackowski submitted a written complaint to IAD concerning Prohaska's

alleged threat. (R. 257 at ¶ 61) On January 10, 2003, Gackowski was offered a transfer anywhere on the jail compound. (R. 553-1) Gackowski declined the transfer offer and informed IAD investigators that he was leaving the CCDOC. (*Id.*)

Fairley last worked a shift at the CCDOC in January 2003, prior to his subpoenaed deposition. (R. 553-1) Gackowski worked his last shift in January 2003, as well. (*Id.*) Both Fairley and Gackowski then used all of their vacation and sick days and tendered their resignations after that time was exhausted on February 3, 2003. (*Id.*)

Gackowski sat for a deposition in the *Fields* case after his resignation from the CCDOC. (R. 448) Plaintiffs concede that none of the Petitioners – nor anyone else associated with the Cook County Department of Corrections – did anything to prevent either of them from testifying on their appointed days. (R. 447-1)

On July 25, 2003, Fairley and Gackowski filed the underlying lawsuit. (R. 1)

The *Fields* case was tried before a jury in May and June of 2005. (R. 420) Both Fairley and Gackowski testified for the plaintiffs. (R. 462-1, R. 465-1) The jury returned a verdict in favor of all of the defendant correctional officers, including Fermaint, Bercasio and Byrne, after deliberating for less than one hour. (R. 420)

II. Proceedings Below

After the close of discovery, but before trial, the district court issued a number of rulings on the parties' motions *in limine*. Plaintiffs sought reconsideration of one of the rulings, or in the alternative for a stay of the trial and a certification of the question to the Seventh Circuit Court of Appeals. The motion was denied. (App., *infra,* 19a -44a) Plaintiffs then filed a pleading that requested the district court enter summary judgment against them in order to pursue an appeal (R.1011-1). The district court granted the motion and entered judgment in favor of the defendants. (R.1014-1).

On appeal, the Seventh Circuit construed the judgment order as a "consent judgment" and held that it had jurisdiction to consider the merits of the appeal. (578 F.3d at 522)

The panel held that *Garcetti v. Ceballos*, 547 U.S. 410, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006), served to bar the plaintiffs' cause of action insofar as it was based on intra-jail reporting, but found that, to the extent the claims were based on an alleged effort to prevent the plaintiffs' future testimony in the *Fields* case, that the plaintiffs could "recover from any defendants" who made "threats of punishment . . . designed to discourage future speech." 578 F.3d at 525.

The panel imposed two "additional requirements": First, "Plaintiffs must show that their potential testimony, not their internal complaints, caused the assaults and threats." 578 F.3d at 525. "This," according to the panel, "means but-for causation." *Id.*

(citing *Gross v. FBL Financial Services, Inc.*, --- U.S. ----, 129 S.Ct. 2343, 174 L.Ed.2d 119 (2009); *Mt. Healthy Board of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977)). Second, the panel required "proof of damages" be shown. The panel posited the "largest item" of damages "will be lost income, if plaintiffs can establish that the threats caused them to quit." 578 F.3d at 526. But held that "[l]esser threats, defamation, and battery . . . also can lead to damages, if these are the sort of harms that would cause a reasonable person to keep quiet." *Id.*

Petitioners filed a Motion for Rehearing and Rehearing *En Banc*. The Motion was denied. (App., *infra*, 50a)

REASONS FOR GRANTING THE PETITION

By way of an expansive reading of the doctrine of "Prior Restraint," the Seventh Circuit opinion at issue effectively transforms the most basic of juvenile, schoolyard threats -- "if you tell on me, I'll beat you up" – into a *prima facie* federal cause of action. The only allegation necessary to achieve a trial on the merits in federal court – other than the allegation of the "threat" itself – is that the "threat" involve state or federal employees rather than schoolchildren.

The panel decision imports the doctrine of "prior restraint" into the area of public employment law in an unprecedented manner and impermissibly expands the reach of a doctrine that this Court has, heretofore, expressly confined to state actions that rise to a "legal impediment . . . to . . . expressive activity." See *Alexander v. United States*, 509 U.S. 544, 551, 113 S.Ct. 2766, 125 L.Ed.2d 441 (1993). The opinion

promises to – quite literally – make a federal case (by the legion) out of what would otherwise be run-of-the-mill workplace frictions between public employees that should, in practice, be resolved within the workplace instead of federal court.

The opinion makes actionable any on-the-job statement or act alleged to have been "designed to discourage future speech." 578 F.3d at 525. Further, under the construction adopted by the panel, the offending statement or act is actionable without regard to whether it *actually* discouraged or prevented whatever "future speech" may be at issue. Instead, the test is objective, permitting the award of damages if it is determined that the offending statement or act "would cause a reasonable person to keep quiet." *Id.*

To equate an allegation of harassment or a physical "threat of punishment" made on the job between two state employees with administrative censorship, an injunction, or a gag order for purposes of the doctrine of prior restraint is to trivialize the First Amendment. It would, too, serve to lower the bar of justiciability beyond the threshold required by Article III.

To permit – as the decision at issue does – everyday workplace frictions to be re-cast as federal lawsuits couched in the First Amendment promises both to diminish the import of the First Amendment and inundate the federal court system.

I. THE DOCTRINE OF PRIOR RESTRAINT DOES NOT MAKE ACTIONABLE, UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION, HARASSMENT OR PHYSICAL "THREATS OF PUNISHMENT"

"Prior restraint" has traditionally described "administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550, 113 S.Ct. 2766, 125 L.Ed.2d 441 (1993) (quoting M. Nimmer, *Nimmer on Freedom of Speech*, §4.03, p. 4-14 (1984). "Temporary restraining orders and permanent injunctions – *i.e.*, court orders that actually forbid speech activities -- are classic examples of prior restraints." *Alexander*, 509 U.S. at 550.

In *Alexander*, the United States Supreme Court held that a court order for forfeiture of assets – issued as punishment for violations of the Racketeering Influenced and Corrupt Organizations Act – did not qualify as a prior restraint because "it does not forbid petitioner from engaging in any expressive activities in the future, nor does it require him to obtain prior approval for any expressive activities." *Alexander*, 509 U.S. at 550-51. The Court concluded that "[u]nlike [an] injunction[] . . . the forfeiture order in this case imposes no legal impediment to – no prior restraint on – petitioner's ability to engage in any expressive activity he chooses." *Id.*

In setting out the history of the prior restraint doctrine, the Court noted that it "expanded this doctrine to include not only licensing schemes requiring speech to be submitted to an administrative

censor for prepublication review, but also injunctions against future speech issued by judges." *Alexander*, 550 U.S. at 553, n. 2. "Quite obviously, however, we have never before countenanced the essentially limitless expansion of the term that petitioner proposes." *Id.*

More recently, the Court expressly refused to expand the doctrine of "prior restraint" to encompass public libraries' collection decisions. See *United States v. American Library Assn., Inc.*, 539 U.S. 194, 209 n. 4 (2003) (rejecting Justice Stevens's argument, in dissent, that would have "mistakenly extend[ed] prior restraint doctrine to the context of public libraries' collection decisions")

The panel's decision below – treating workplace harassment as a potential "prior restraint" – would lead to an unprecedented and "essentially limitless expansion" of the prior restraint doctrine far beyond that disapproved in *Alexander*.

Here, for sake of example, the sum and substance of the claim against one of the Petitioners, former correctional officer Fred Coffey, is that he threatened "to beat up" Fairley in "late 1998 or early 1999" and, on a separate occasion at least three years later "warned Plaintiff Fairley . . . that officers who tell on other officers 'usually get met in the parking lot." (R. 257-12) Fairley did not report the alleged "threats" (which Coffey denies making in the first instance) to his superiors or seek to resolve his issue with Coffey otherwise (through his union, for example). He instead quit his job and sued Coffey for a "violation" of his putative First Amendment rights for allegedly "discouraging" him from later testifying in a pending

lawsuit – a lawsuit to which neither Fairley nor Coffey was a party.

Under the panel's decision, Fairley's claim against Coffey is actionable despite the fact that the alleged "threats" were both unfulfilled and did nothing, in reality, to discourage Fairley's eventual testimony – Fairley having admitted that neither Coffey (nor any of the other defendants), did anything to prevent him from testifying at any of the sessions he submitted to depositions in the *Fields* case, or at trial.

The "threats," used in the context of prior restraint jurisprudence, have been – heretofore – confined to "threats" that a regulation, law or decree would be enforced. In *United Public Workers v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556 (1947), for example, the Court analyzed the effect of the Hatch Act on federal employees' First Amendment rights. Considering, in the first instance, whether the underlying suit was actionable, the Court analyzed whether there had been a justiciable injury, setting out a continuum ranging between a "general threat by officials to enforce those laws which they are charged to administer" and a "direct threat of punishment against a named party for a completed act." *Mitchell*, 330 U.S. at 88. The Court held only an action alleging the latter satisfied the "case or controversy" requirement of Article III and that "a general threat of possible interference with [First Amendment] rights by the Civil Service Commission under its rules, if specified things are done by appellants, does not make a justiciable case or controversy." *Mitchell*, 330 U.S. at 89. See also *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979), ("credible threat" of criminal prosecution under statute

at issue satisfied case or controversy requirement of Article III).

Until now, every actionable prior restraint has presented some legal impediment to speech before it occurred – and presented a circumstance by which speaking in the face of the legal impediment subjected the speaker to some type of penalty, most commonly a fine or arrest. See Emerson, Thomas *The Doctrine of Prior Restraint,* 20 LAW & CONTEMP. PROBS. 648, 648 (1955).

The Court has never had cause to consider *physical* threats in a public workplace as a *de facto* prior restraint actionable under the United States Constitution. And the extension approved by the Seventh Circuit in the opinion at issue carries with it the very real prospect of inundating the courts here with new First Amendment-related employment litigation.

Hundreds of lawsuits are filed by inmates and detainees at the Cook County jail annually. Many hundreds are also disposed of at various stages, as well, but at any given time, dozens upon dozens of Cook County correctional officers are named defendants in one or more pending state and federal civil cases. Dozens upon dozens more are witnesses (or potential witnesses) to the various claims. (In the *Fields* case at issue here the plaintiffs named -- as party defendants -- nearly 40% of the jail's correctional staff on duty in the division at the time of the incident). Very nearly any correctional officer could attempt to attribute a fellow correctional officer's action or inaction as having been motivated by an attempt to influence potential testimony in one of the

hundreds of pending suits. And under the Seventh Circuit's formulation of "prior restraint," that action or inaction would itself become the basis for yet another lawsuit if it could be claimed that such action or inaction would "cause a reasonable person to keep quiet."

The Seventh Circuit's extension of the doctrine of prior restraint is unprecedented and should not be permitted to stand.

CONCLUSION

For all the reasons set forth herein, the Petitioners respectfully request that the petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 07-3343

[Filed August 20, 2009]

ROGER FAIRLEY AND RICHARD GACKOWSKI, *Plaintiffs-Appellants*,

v.

DENNIS ANDREWS, et al., *Defendants-Appellees*.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 03 C 5207—**Amy J. St. Eve**, *Judge*.

ARGUED MAY 6, 2009—DECIDED AUGUST 20, 2009

Before EASTERBROOK, *Chief Judge*, and POSNER and WOOD, *Circuit Judges*.

EASTERBROOK, *Chief Judge*. Roger Fairley and Richard Gackowski worked as guards at the Cook County Jail in Chicago. After their peers threatened to

kill them, they quit and sued the other guards, complaint handlers, the sheriff, and the County. (In saying that death threats were made, and throughout the opinion, we present the evidence in the light most favorable to plaintiffs. Defendants deny many of plaintiffs' principal contentions.)

Guards at the Jail regularly beat prisoners without justification. The harm plaintiffs complain of, however, is not the injuries suffered by prisoners but how other guards reacted when plaintiffs opposed the maltreatment. For example, in April 2000 Gackowski objected when Fred Coffey struck inmate Brown. Gackowski followed up with an internal complaint. Coffey and other guards responded by taunting Gackowski, calling him a "snitch" who "had no heart."

Four months later a fight broke out in Special Incarceration Unit 2, which holds the Jail's most dangerous inmates. After the prisoners had been subdued and shackled, guards Evan Fermaint, Noberto Bercasio, and Edward Byrne beat them. Fairley told them to stop. Byrne snapped: "They want to hurt my officers. . . . [K]ill 'em. They deserve to die." Byrne later told Gackowski (who had not seen the altercation) that he had twisted and jumped on an inmate's leg but couldn't get the bones to break. Byrne told Fairley not to file an incident report. Bercasio and Fermaint tagged Fairley "inmate lover."

Though the Department of Corrections' General Orders require guards to report any misconduct by their peers, plaintiffs say that this does not reflect reality; according to them, the Jail's real rule is a ban on reporting misconduct—a "code of silence." At the training academy, instructors told cadets to stick

together and "don't say any bad remarks about anybody." This attitude pervaded the Jail.

Tensions mounted when the inmates involved in the incident in Special Incarceration Unit 2 filed suit. *Fields v. Byrne*, No. 00 I. 9339 (Cir. Ct. Cook County filed Aug. 16, 2000). Fairley and Gackowski told other guards that, if subpoenaed, they would tell the truth about what they had seen and heard. Fields's lawyer sent an investigator to Fairley's home, but Fairley said he hadn't seen anything. Fairley informed his superiors about the visit. They obtained a court order restricting Fields's access to guards and told the guards not to talk to anyone about what happened.

Plaintiffs' willingness to testify in *Fields* infuriated the other guards. Bercasio and Fermaint forcefully "dry humped" plaintiffs by grabbing them from behind and simulating anal intercourse. Bercasio posted on the Jail's bulletin boards pornographic cartoons featuring Gackowski. Supervisors repeatedly assigned plaintiffs to Special Incarceration Unit 2 without adequate supplies; other guards refused to let them out to use the restroom. Byrne denied Fairley's request for paternity leave and refused to pay plaintiffs for overtime they had worked. The taunts "inmate lover" and "social worker" flew freely.

Gackowski submitted an internal-affairs complaint about the bullying in August 2002, two years after *Fields* was filed. In December Fields served a subpoena on Fairley. Later that month inmate Lipscomb attacked Fairley with a shank, cutting him on the wrist. Bercasio remarked: "You see that, Fairley? You fuck with people, that's how you get stabbed." (Plaintiffs do not allege that guards

furnished Lipscomb with the shank.) Internal investigators dragged their heels. Ronald Prohaska told Gackowski, "[I]f Fairley goes into court on this SI-2 case . . . and tells the truth, he will fuck everyone involved. . . . We always knew he was a weak link and when a weak link can fuck everyone in the chain, then we have to bury the weak link. It's nothing personal. It's just business. . . . Just like with your complaint trying to fuck fellow officers."

Fearing further attacks, plaintiffs used all accrued leave time and then quit on February 4, 2003. Fairley had given his deposition in *Fields* a few weeks earlier; Gackowski was deposed in mid-February. Both testified at trial. The jury returned a defense verdict.

Fairley and Gackowski seek relief under 42 U.S.C. §1983. They contend that defendants violated their speech rights by assaulting and threatening them for reporting abuse to Jail supervisors and for their willingness to testify truthfully in *Fields*. They also contend some of the defendants violated their rights by preventing their complaints from moving up the chain of command.

Before reaching the merits we must address appellate jurisdiction. Shortly before trial was to begin, the court granted a motion to exclude all evidence of events that took place before Fairley and Gackowski gave their depositions. 2007 U.S. Dist. LEXIS 70539 (N.D. Ill. Sept. 24, 2007) (denying plaintiffs' motion for reconsideration). Plaintiffs call their theory "retaliation"—we'll consider later whether that's a helpful word—and the district judge believed that "retaliation" must follow protected speech. Because effects can't precede their causes, everything

before the depositions must be irrelevant. (The district judge had already dismissed the claim alleging punishment for filing internal complaints.) Plaintiffs contested this decision but acknowledged that, given the ruling, they could not prove their case, since the assaults and threats all occurred before the depositions. The judge responded: "[I]f you are still saying that you concede that you cannot prove causation in your case based on the Court's rulings, then I will grant judgment for the defendants on that issue, and you can take it all up to the Seventh Circuit."

Oddly, the court's docket entry states that plaintiffs' response to defendants' motion for summary judgment "is converted to a motion by Plaintiff [to] dismiss." (A docket entry is an improper substitute for a judgment. Fed. R. Civ. P. 58 requires a document separate from the statement of reasons supporting the relief granted in the judgment.) Defendants seize on this language, arguing that it shows that the court dismissed the case pursuant to Fed. R. Civ. P. 41(a)(1) (voluntary dismissal by the plaintiff). And defendants read cases such as *Chavez v. Illinois State Police*, 251 F.3d 612 (7th Cir. 2001), to bar appeals from actions terminated under Rule 41(a)(1).

Defendants are mistaken. The only prerequisites to appellate jurisdiction are a final judgment and a timely notice of appeal. 28 U.S.C. §1291. Whether a party consented to that judgment (and which particular rule of civil procedure the district court invoked) is irrelevant. *McMillian v. Sheraton Chicago Hotel & Towers*, 567 F.3d 839 (7th Cir. 2009); *Downey v. State Farm Fire & Casualty Co.*, 266 F.3d 675 (7th

Cir. 2001). The judgment here is final and the notice timely, so we have jurisdiction.

That said, if plaintiffs consented to the entry of judgment against them, we must affirm. Litigants aren't aggrieved when the judge does what they want. *Nashville, Chattanooga & St. Louis Ry. v. United States*, 113 U.S. 261 (1885). Plaintiffs contend that they accepted dismissal as inevitable only after the district court gutted their case. This matches the district judge's description. Cf. *Katz v. Gerardi*, 552 F.3d 558, 563 (7th Cir. 2009). Acknowledging that a case is hopeless, given a prior ruling (which the party believes to be unsound), is a far cry from abandoning the suit. *McMillian* and *Downey* hold that a party who asks for a final judgment in order to appeal an antecedent ruling is entitled to contest the merits of that issue on appeal. *Chavez* illustrates this principle. After the district court dismissed some of plaintiffs' claims, they requested the entry of judgment against them. We reviewed claims rejected by the court but refused to consider claims that were still live when plaintiffs asked for judgment. The rule is simple: if plaintiff loses on A and abandons B in order to make the judgment final and thus obtain immediate review, the court will consider A, but B is lost forever. See also *Pollution Control Industries of America, Inc. v. Van Gundy*, 979 F.2d 1271 (7th Cir. 1992).

On to the merits. Fairley and Gackowski present two theories of recovery under the first amendment: first, that defendants punished them for defying the code of silence by reporting fellow guards' misconduct; second, that defendants bullied them to keep them from testifying in *Fields*.

Garcetti v. Ceballos, 547 U.S. 410 (2006), holds that the first amendment does not protect statements made as part of one's job. Ceballos, a deputy district attorney, discovered what he believed were material misrepresentations in an affidavit that had been used to support a search warrant. He wrote a memo to his superior suggesting that the case be dismissed. When the supervisor disagreed, Ceballos pressed his view. The supervisor responded by transferring Ceballos to another office and refusing to promote him; Ceballos sued. The ninth circuit concluded that the first amendment applies to speech that is part of a worker's responsibilities. *Ceballos v. Garcetti*, 361 F.3d 1168, 1174–75 (9th Cir. 2004). The Justices reversed, holding that the first amendment does not regulate the way in which a public employee's job is performed. The Constitution does not restrict a public employer's ability to manage the workplace, whether the bureaucracy's tasks entail speech or action.

The Jail's General Orders thus pose a problem for plaintiffs' first theory. Since the General Orders require guards to report misconduct by their colleagues, the guards' reports are not part of the freedom of speech— and how the sheriff responds is a question for statutes, regulations, and wise management rather than the Constitution. Ceballos reported that his co-workers had likely broken the law; his superior thought that the memo displayed bad judgment and acted accordingly. See also *Vose v. Kliment*, 506 F.3d 565 (7th Cir. 2007). So here, plaintiffs reported what they deemed illegal conduct by co-workers, and that speech is not protected.

Plaintiffs try to avoid *Garcetti* by arguing that the Jail's actual rule is the opposite of what's in the

manual: a guard must *not* report a co-worker's misconduct. Since they did not have an official duty to complain, *Garcetti* is inapplicable, plaintiffs maintain. (Another reason they advance this "code of silence" theory is to establish that the Jail has an official policy of punishing guards who speak out. See *Monell v. New York Department of Social Services*, 436 U.S. 658 (1978). In response, the sheriff has agreed to accept liability if any of the guards is found liable; this does not affect analysis under *Garcetti*.)

Alaska v. EEOC, 564 F.3d 1062 (9th Cir. 2009) (en banc), supports plaintiffs' position. Lydia Jones, an aide to the Governor of Alaska, asserted that she had been sexually harassed at work. A second aide, Margaret Ward, corroborated the accusations in a workplace interview and press conference. The governor fired both of them. The ninth circuit held that *Garcetti* does not apply unless the employer has officially assigned to the employee a task of making *particular* speech, requiring the worker to act precisely as she did. Because Ward had not been commanded to file internal complaints or issue press releases, her suit could go forward. *Id.* at 1070–71 & n.7.

Yet *Garcetti* is not limited to tasks officially assigned to an employee. Ceballos himself did not have a duty to make the report, or include the accusations, that got him into trouble; communicating with his superiors was simply within the general ambit of his job. The Justices have distinguished between public and private speech by asking about the employer's real rules and expectations, not just official requirements contained in a manual or formal directive. *Garcetti*, 547 U.S. at 424–25. See also *Alaska*, 564 F.3d at 1074–76 (O'Scannlain, J., dissenting). See also *Riley v.*

Blagojevich, 425 F.3d 357 (7th Cir. 2005) (explaining why written job descriptions are not conclusive for identifying policy-making or discretionary jobs for which politics are an appropriate consideration).

Garcetti applies to job requirements that limit, as well as those that require, speech. Suppose the Jail put a guard in charge of maintaining a bulletin board, instructing him to post only materials that relate to workplace safety. If the guard puts up something on a different topic, or fails to put up anything, the management may discipline the guard without encountering an objection under the first amendment. See *Guardian Industries Corp. v. NLRB*, 49 F.3d 317, 319–20 (7th Cir. 1995); cf. *Mayer v. Monroe County Community School Corp.*, 474 F.3d 477 (7th Cir. 2007) (school may discipline teacher for conducting an anti-war demonstration during class time).

And *Garcetti* can't be limited to "good" workplace requirements, as the ninth circuit supposed in *Alaska*. Ceballos was fired for reporting conduct that he believed was illegal. The Justices did not praise the district attorney's response; they held instead that state law rather than the federal Constitution determines whether a public work force is being well managed. If an employer has instructed the workers to keep their mouths shut during working hours on questions related to performance of their (and co-workers') jobs, the first amendment does not prevent the employer from enforcing that requirement. Whistle-blower protection statutes or labor law might provide a remedy (particularly if an employee is punished for reporting illegal acts), but the Constitution does not.

The purported code of silence is a ban on filing complaints about guard-on-inmate violence. Such a policy might be foolish; it might expose the County to other lawsuits; but it does not offend the first amendment, because what one guard says about another through the grievance system is part of the job, and the employer can discipline a guard for poor performance of work-related tasks. See *Mayer*, 474 F.3d at 479. Compare *Garcetti* with *Rankin v. McPherson*, 483 U.S. 378 (1987), and *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979). We disapprove *Alaska v. EEOC* to the extent that decision rests on a belief that *Garcetti* applies only to speech expressly commanded by an employer. See also *Winder v. Erste*, 566 F.3d 209 (D.C. Cir. 2009); *Haynes v. Circleville*, 474 F.3d 357 (6th Cir. 2007); *Thomas v. Blanchard*, 548 F.3d 1317 (10th Cir. 2008); *Abdur-Rahman v. Walker*, 567 F.3d 1278 (11th Cir. 2009).

Bercasio, Fermaint, and the other guards are not plaintiffs' employer, however. Whether *Garcetti* protects their actions is a novel question. To recover under the first amendment, a plaintiff must prove, among other things, both that his speech was "protected" and that the government's (more accurately, a given state actor's) justification for curtailing the speech was inadequate. *Garcetti* appears to address the first question, but its reasoning focuses on the justification of a particular defendant: the government employer. Thus it is conceivable that the Court might hold the same speech "not protected" vis-à-vis the employer, but "protected" vis-à-vis co-workers.

This case illustrates the importance of properly characterizing *Garcetti*'s holding. If plaintiffs' speech is categorically not protected, any state actor can punish plaintiffs in any way he wishes without incurring liability under the first amendment. But if the Justices instead dealt with the justification of a particular state actor, the acts of one defendant (the sheriff) might be justified, while the acts of others (fellow guards) might not, for guards cannot assert the same interest in maintaining smooth operations as the Jail's administrators. Imagine that Cook County's in-house counsel, furious about the snitching, beat up Fairley after work. Why should the County's need for flexibility in running its Jail insulate the actions of all state actors? Though we have treated *Garcetti* as dealing with the question whether speech is protected, see, e.g., *Chaklos v. Stevens*, 560 F.3d 705, 711–12 (7th Cir. 2009); *Renken v. Gregory*, 541 F.3d 769, 773–75 (7th Cir. 2008), we have never considered how it applies to a non-employer.

Unfortunately for Fairley and Gackowski, their *Monell* argument—that the Jail has a policy forbidding complaints about guards who abuse inmates—links the guards' fates to the sheriff's. If a code of silence is the rule, then the guards were merely enforcing the Jail's policy. Although the guards' conduct might have been tortious or even criminal, see 720 ILCS 5/32-4 (witness tampering), plaintiffs do not want tort damages. They have framed their case in a way that can yield one of only two results: either everyone is liable under the first amendment or no one is liable. Since the first amendment does not support a claim against the sheriff, all defendants win.

Fairley and Gackowski might have contended that the General Orders, rather than an unwritten code of silence, were the official rule. As this argument would go, some guards set out to violate the Orders by punishing anyone who informs on another guard. The Jail's employment policies would be out of the picture, and we would have to decide whether *Garcetti* shields non-employer state actors who try to subvert the employer's policies. But plaintiffs argue only the inverse—that the Jail's policy is silence, and that guards enforce this through threats condoned, if not commanded, by management—so this theory is off the table. We reserve the question how *Garcetti* applies to punishments meted out by non-employers. (We emphasize that we express no opinion on the legality of defendants' conduct. We merely reject the argument that prohibiting guards from complaining to supervisors violates the first amendment.)

Plaintiffs' second theory is that they were bullied and threatened in order to deter them from testifying in *Fields*. This claim falls outside *Garcetti*. The Jail likely requires guards to testify on its behalf and pays them for time at court. Testifying against the Jail might not be part of the job, but that doesn't matter. Even if offering (adverse) testimony is a job duty, courts rather than employers are entitled to supervise the process. A government cannot tell its employees what to say in court, see 18 U.S.C. §1512, nor can it prevent them from testifying against it.

Defendants' only contention is that no one "retaliated" against plaintiffs for testifying, because the insults, assaults, and threats all preceded plaintiffs' depositions in *Fields*. This misapprehends the nature of plaintiffs' claim. The Constitution

prevents governmental actors from forbidding, or penalizing, speech that is protected under the first amendment. Penalties that follow speech are forbidden. This includes, but certainly is not limited to, reactions to what has already been said. E.g., *Milwaukee Deputy Sheriff's Association v. Clarke*, No. 08-3298 (7th Cir. July 21, 2009); *Crue v. Aiken*, 370 F.3d 668 (7th Cir. 2004); *Ridpath v. Marshall University*, 447 F.3d 292, 319–20 (4th Cir. 2006). (Of course, the sanction or threat must be serious enough to deter an ordinary person from speaking. *Bart v. Telford*, 677 F.2d 622 (7th Cir. 1982).) But threats of penalties also are forbidden. That's why it can be misleading to speak of "retaliation" as the basis of a suit. The word implies that threats don't matter, and the district court here was misled.

Threatening penalties for future speech goes by the name "prior restraint," and a prior restraint is the quintessential first-amendment violation. *Nebraska Press Association v. Stuart*, 427 U.S. 539, 559 (1976) (judicial gag order); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 552–53 (1975) (executive censorship). Indeed, for a time it appeared that prior restraints were the only actions forbidden by the first amendment. See *Schenck v. United States*, 249 U.S. 47 (1919). Later cases have held that penal ties for completed speech also violate the Constitution, but this development does not suggest that only post-speech penalties now matter.

The word "retaliation" has the potential, realized here, to divert attention from the rule that both threats designed to deter future speech and penalties for past speech are forbidden. "Retaliation" as a legal theory comes from employment-discrimination suits.

See, e.g., 31 U.S.C. §3730(h); 42 U.S.C. §12203. We have borrowed the word in cases where an employer punishes an employee on account of speech. E.g., *Chaklos*, 560 F.3d at 711. Using one word for two kinds of claim has the potential to confuse. Cf. *Krolnik v. Prudential Insurance Co. of America*, 570 F.3d 841 (7th Cir. 2009). Because only a subset of viable first-amendment claims involves retaliatory discharge, it is generally best to avoid the word.

The first amendment protects speakers from threats of punishment that are designed to discourage future speech. Fairley and Gackowski can recover from any defendants who made such threats—though there are two additional requirements.

One is proof of causation. Plaintiffs must show that their potential testimony, not their internal complaints, caused the assaults and threats. This means but-for causation. See *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009); *Mt. Healthy Board of Education v. Doyle*, 429 U.S. 274 (1977). Some decisions (*Matrisciano v. Randle*, 569 F.3d 723 (7th Cir. 2009), is the latest) say that a plaintiff just needs to show that his speech was a motivating factor in defendant's decision. These decisions do not survive *Gross*, which holds that, unless a statute (such as the Civil Rights Act of 1991) provides otherwise, demonstrating but-for causation is part of the plaintiff's burden in all suits under federal law. The record has evidence from which a reasonable jury could find causation; no more is necessary at this stage, but the instructions at trial must reflect the holding of *Gross*.

The second requirement is proof of damages. The largest item will be lost income, if plaintiffs can establish that the threats caused them to quit. Cf. *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004). Lesser threats, defamation, and battery (the dry humping) also can lead to damages, if these are the sort of harms that would cause a reasonable person to keep quiet. *Bart*, 677 F.2d at 625. But because *Garcetti* covers the intra-Jail complaints, actions that occurred before the altercation in Special Incarceration Unit 2, such as the taunting that followed Gackowski's defense of inmate Brown, are not an appropriate source of damages.

One final observation. Plaintiffs pleaded a conspiracy claim under 42 U.S.C. §1985(3), but it's superfluous. The function of §1985(3) is to permit recovery from a private actor who has conspired with state actors. See *Dennis v. Sparks*, 449 U.S. 24 (1980); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). All defendants are state actors, so a §1985(3) claim does not add anything except needless complexity. Plaintiffs appear to think that the §1985(3) claim expands the scope of admissible evidence. But Fed. R. Evid. 801(d)(2)(E) (statement of coconspirator is not hearsay) applies whether or not the defendants are formally charged with a conspiracy. The rule making one conspirator's statements admissible against another rests on a theory of agency, not on the allegations in the complaint. If plaintiffs can show that the defendants acted in concert, then Rule 801(d)(2)(E) will apply. And the judge, not the jury, makes this decision. See Fed. R. Evid. 104(a); *United States v. Martinez de Ortiz*, 907 F.2d 629 (7th Cir. 1990) (en banc).

The judgment is affirmed to the extent that the district court dismissed plaintiffs' "code of silence" claim and the conspiracy claim. To the extent that it dismissed the prior-restraint claim, the judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

[SEAL]

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FINAL JUDGMENT

August 20, 2009

BEFORE:

FRANK H. EASTERBROOK, *Chief Judge*

RICHARD A. POSNER, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

No.: 07-3343	ROGER FAIRLEY and RICHARD GACKOWSKI., Plaintiffs - Appellants v. DENNIS ANDREWS, et al., Defendants - Appellees

Originating Case Information:
District Court No: 1:03-cv-05207 Northern District of Illinois, Eastern Division District Judge Amy J. St. Eve

The judgment of the district court is **AFFIRMED** to the extent that the district court dismissed plaintiffs' "code of silence" claim and the conspiracy claim. To the extent that it dismissed the prior-restraint claim, the judgment is **REVERSED**, and the case is **REMANDED** for further proceedings consistent with the opinion. The above is in accordance with the decision of this court entered on this date. Appellants shall recover their costs.

form name: **c7_FinalJudgment** (form ID: **132**)

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 03 C 5207

[Filed September 26, 2007]

ROGER FAIRLEY and RICHARD GACKOWSKI, Plaintiffs,	)
v.	)
SUPT. DENNIS ANDREWS, LT. EDWARD BYRNE, SGT. PATRICK LOIZON, OFC. EVAN FERMAINT OFC. NOBERTO BERCASIO, OFC. FRED COFFEY, OFC. RONALD PROHASKA, FORMER CHIEF INVESTIGATOR SAUL WEINSTEIN, CHIEF INVESTIGATOR TIM KAUFMANN, CHIEF INVESTIGATOR JUAN DIAZ, in their individual and official capacities, and SHERIFF MICHAEL SHEAHAN, in his official capacity, Defendants.	)

MEMORANDUM OPINION AND ORDER

AMY J. ST. EVE, District Court Judge:

Before the Court is Plaintiffs' motion for reconsideration of the Court's September 11, 2007 ruling granting Defendants' motion in limine #8. In the alternative, Plaintiffs move to stay the trial – scheduled to commence on October 9, 2007 – and to certify a question of law for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The Court held a hearing on Plaintiffs' motion and the parties have briefed the relevant issues. The Court presumes familiarity with its prior orders and the Seventh Circuit decision in *Fairley v. Fermaint*, 482 F.3d 897 (7th Cir. 2007). For the following reasons, the Court denies Plaintiffs' motion for reconsideration and for certification for interlocutory appeal pursuant to Section 1292(b).

I. Motion for Reconsideration

A. Legal Standard

Because the Court's September 11, 2007, Minute Order granting Defendants' motion in limine #8 did not dispose of this case in its entirety, the Court reviews Plaintiffs' motion for reconsideration pursuant to Federal Rule of Civil Procedure 54(b). Under Rule 54(b), the Court may exercise its inherent authority to reconsider its interlocutory orders because such orders are "subject to revision at any time before the entry of judgment adjudicating all the claims." *See* Fed.R.Civ.P. 54(b); *see also Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 12, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) ("every order short of a final

decree is subject to reopening at the discretion of the district judge"). Accordingly, under Rule 54(b), the Court may correct any manifest errors of law or fact in its September 11, 2007 minute order. *See Zurich Capital Mkt., Inc. v. Coglianese*, 383 F. Supp. 2d 1041, 1045 (N.D. Ill. 2005) (citation omitted).

B. Procedural Background

On July 25, 2003, Plaintiffs Roger Fairley and Richard Gackowski, two former correctional officers who worked at the Cook County Jail, brought the present lawsuit alleging First Amendment retaliation and conspiracy claims, among others, against the Sheriff of Cook County and eight correctional officers, supervisors, and Sheriff's Office employees.[1]

On May 4, 2006, the Court granted Defendants' motion for summary judgment regarding Plaintiffs' conspiracy claim, namely, that Defendants conspired to deprive them of their constitutional right to free speech. The Court, however, denied Defendants' summary judgment motion concerning Plaintiffs' First Amendment retaliation claim and attendant *Monell* claim.

On May 30, 2006, the Supreme Court decided *Garcetti v. Ceballos*, ___U.S. ___, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006). The *Garcetti* Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications

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[1] This case was reassigned to the Court on March 17, 2006.

from employer discipline." *Id.* at 1960. On June 9, 2006, Defendants Dennis Andrews, Edward Byrne, Ronald Prohaska, Tim Kaufmann, Saul Weinstein, and Michael Sheahan filed a Joint Motion for Summary Judgment based on *Garcetti.*

Meanwhile, on May 18, 2006, Defendants Evan Fermaint, Noberto Bercasio, and Fred Coffey filed an interlocutory appeal with the Seventh Circuit based on the Court's denial of summary judgment on their qualified immunity defense. On December 20, 2006, the Seventh Circuit issued its opinion dismissing the appeal for want of jurisdiction. *See Fairley v. Fermaint,* 471 F.3d 826, 829 (7th Cir. 2006). On January 3, 2007, Fermaint, Bercasio, and Coffey filed a Petition for Rehearing and Petition for Rehearing En Banc to the Seventh Circuit.

On March 19, 2007, the Seventh Circuit granted Defendants' Petition for Rehearing. *See Fairley v. Fermaint,* 482 F.3d 897 (7th Cir. 2007). In doing so, the Seventh Circuit concluded that Defendants' appeal was timely, and thus reached the merits of Defendants' qualified immunity defense. The Seventh Circuit then concluded that Defendants' qualified immunity defense relied upon questions of fact to be resolved at trial. *Id.* at 902. In making its determination, the Seventh Circuit stated:

> Our conclusion that this appeal is timely does not mean, however, that the defendants are home free. Defendants' principal argument relies on *Garcetti v. Ceballos,* 126 S. Ct. 1951 (2006), which holds that, "when public employees make statements pursuant to their official duties, the employees are not speaking

as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* at 1960. Defendants invoke *Garcetti* for the proposition that plaintiffs' speech in the workplace is not covered by the first amendment, so they are entitled to prevail even though their reactions to that speech are asserted to be extra-legal and reprehensible. Such responses may be actionable under state law in the wake of *Garcetti*, defendants allow, but cannot be treated as constitutional torts.

Plaintiffs maintain, however, that defendants reacted adversely to two kinds of speech: not only statements made as part of their duties at work (the kind of speech to which *Garcetti* applies) but also to testimony that plaintiffs gave in inmates' suits. Assistance to prisoners and their lawyers in litigation is not part of a guard's official duties. To apply *Garcetti*, therefore, we would need to determine whether defendants reacted to plaintiffs' activities in litigation (they say not) and which of defendants' deeds can be traced to the litigation as opposed to events at work. Piecing out the state of the record, and drawing inferences from the evidence, is not allowed on an interlocutory appeal based on a claim of immunity. The role of an appeal under *Mitchell* and *Behrens* is to determine whether the legal principles that apply to public officials were clearly established at the time those officials acted; it is not to determine what the officials

did in fact, for that would impinge on the jury's task.

Id.

On April 16, 2007, the Court denied Defendants' Second Motion for Summary Judgment based on *Garcetti* and denied Defendants' motion for reconsideration on May 7, 2007. The Court concluded that there were genuine issues of material fact for trial whether: (1) Plaintiffs assisted in the Fields litigation prior to their 2003 Fields depositions; and (2) Defendants retaliated against Plaintiffs based on such assistance. (R. 826-1, May 7, 2007, Minute Order at 2.)

C. The Effect of *Garcetti*

The Supreme Court's opinion in *Garcetti* has had a significant impact on Plaintiffs' case. When Plaintiffs filed this lawsuit, they premised their First Amendment retaliation claims on speaking out while at work against alleged physical abuse of inmates by correctional officers at the CCDOC. Three years later, *Garcetti* "significantly limit[ed] First Amendment protection of public employees' speech." *Salas v. Wisconsin Dep't of Corrections*, 493 F.3d 913, 925 (7th Cir. 2007). In *Garcetti*, the Supreme Court held that public employees who make statements pursuant to their official duties "are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti*, 126 S.Ct. 1951, 1960. Because the majority of Plaintiffs' allegations pertained to speech made as part of their official duties, such claims are no longer viable under the First Amendment. The only speech in this case that remains protected after

Garcetti pertains to speech and expressions regarding Plaintiffs "[a]ssistance to prisoners and their lawyers in litigation ...." *Fairley v. Fermaint,* 482 F.3d 897, 902 (7th Cir. 2007). Because Plaintiff Fairley's first deposition in the Fields Litigation took place shortly before he resigned and his second deposition occurred months after his resignation and because Plaintiff Gackowski's depositions in the Fields Litigation took place after he resigned, Plaintiffs' case is significantly narrowed.

Given the limits *Garcetti* has imposed, Plaintiffs now seek to expand their theory of the case to cover claims that the Seventh Circuit does not recognize. Plaintiffs' counsel argues that this new theory is an "outgrowth" of *Garcetti*. Specifically, Plaintiffs claim that from July 2000 – the date of the Fields incident at the CCDOC which subsequently resulted in the Fields Litigation – any harassment of Plaintiffs by Defendants was an effort to intimidate them and chill any future speech that is covered under the First Amendment, namely, any assistance to the plaintiffs in the Fields Litigation, even though Plaintiffs had not engaged in any protected speech at that time.

D. Minute Order of September 11, 2007

Defendants motion in limine #8 sought to preclude the admission of a hand written memorandum written by Plaintiff Fairley. In addressing the motion, the Court stated:

> Plaintiffs correctly note that "the conduct at issue not only involves actions after Plaintiffs' depositions in the Fields Litigation, but also any adverse conduct related to Plaintiffs' overall

assistance to the Fields Litigation." Instead of setting forth any such adverse conduct related to the memorandum, Plaintiffs argue that Defendants "attempted to silence plaintiff Fairley (and plaintiff Gackowski) by intimidating them, so they would not reveal during the course of the Fields litigation what they knew about incidents of excessive force, specifically including the July 29, 2000 beating in the SI-2 Unit." According to Plaintiffs, because the memorandum contains speech that Defendant attempted to suppress through "intimidating and harassing Fairley from as early as 2000" is it relevant and admissible. Plaintiffs go too far.

....

It is clear that the First Amendment protects a public employee's right to speak as a citizen about matters of public concern under certain circumstances. *Garcetti v. Ceballos*, ___ U.S. ___, ___, 126 S.Ct. 1951, 1957, 164 L.Ed.2d 689 (2006). As the Seventh Circuit recently noted,

> *Garcetti* made it clear that public employees have no cause of action for First Amendment retaliation unless they were disciplined for speaking *as citizens* about a matter of public concern. 126 S.Ct. at 1958, 1960. When public employees make statements pursuant to their official duties, they are not speaking as citizens and "the Constitution does not insulate their communications from employer discipline." *Id.* at 1960. In other words, if Spiegla's statements to Schrader were made pursuant to her official duties as a correctional officer, it was not protected

> speech and she has no claim for First Amendment retaliation.

Spiegla v. Hull 481 F.3d 961, 963-64 (7th Cir. 2007). The protection applies to *speech*, not to future speech. *See Wernsing v. Thompson* 423 F.3d 732, 752 (7th Cir. 2005) ("I n the retaliation context, speakers simply may not invoke the protections of the First Amendment based on unexpressed viewpoints or un-uttered thoughts"); *Remus v. Sheahan* 2006 WL 418654, at *5 n.11 (N.D. Ill. 2006) (citing *Wernsing,* 423 F.3d at 752-53) ("Plaintiff also alleges that Ryan and Sheahan were motivated by their expectation that plaintiff would not lie about having requested a full investigation. SAC ¶¶ 47, 53. Plaintiff, however, does not allege that he actually spoke out about there being a coverup. The retaliation claim cannot be based on speech that never actually occurred"). Further, an essential element of Plaintiffs' Section 1983 retaliation claim is that their speech was a substantial or motivating factor in the retaliation. *See Ashman v. Barrows*, 438 F.3d 781, 784 (7th Cir. 2006). Plaintiffs have not identified any case law – and the Court has found none – to support their theory that the First Amendment protects silence. While this memorandum is the type of speech that could be protected under *Garcetti* because it involves Plaintiff Fairley's assistance in ongoing litigation, Plaintiffs have not argued the necessary link between it and Defendants. Because Plaintiffs have failed to identify any evidence that Defendants knew of this memorandum and that it was a motivating factor in their alleged retaliated against Plaintiffs, the memorandum is not admissible. The Court is granting the motion without prejudice. If

Plaintiffs can establish this evidentiary link at trial, they can ask the Court to revisit this issue.

(R. 970-1, Sept. 11, 2007, Minute Order, at 3-4.)

E. Plaintiffs' Arguments

In their motion for reconsideration, Plaintiffs argue that the Court's in limine ruling was a manifest error of law because the Court concluded that Plaintiffs' silence prior to Defendants' alleged retaliatory conduct was not protected speech. *See Wernsing v. Thompson*, 423 F.3d 732, 873 (7th Cir. 2005) ("In the retaliation context, speakers simply may not invoke the protections of the First Amendment based on unexpressed viewpoints or un-uttered thoughts."). Plaintiffs' reconsideration motion goes beyond the Court's ruling on Defendants' in limine motion, however, and to the heart of Plaintiffs' theory of the case – a theory that Plaintiffs admittedly have had to modify since *Garcetti*. Plaintiffs now define their theory of the case as such: "[T]he First Amendment protects speech on matters of public concern which defendants had reason to believe plaintiffs would utter during their *Fields* testimony, and that the First Amendment therefore prohibited defendants from taking adverse actions against plaintiffs to prevent them from engaging in that protected speech." (R. 1000-1, Pls.' Mot. Recons. Reply, at 5.) Although Plaintiffs acknowledge that First Amendment retaliation claims require that a public employee's protected speech must precede a defendant's retaliatory conduct, they contend that this First Amendment claim is not a traditional retaliation claim. Instead, Plaintiffs are attempting to bring a derivative First Amendment retaliation claim based on

the chilling of their protected speech without showing that any protected speech preceded Defendants' retaliatory harassment and intimidation.

In support of this novel theory, Plaintiffs rely on Fourth Circuit case law:

> A chilling claim is essentially the derivative of a retaliation claim: if a public employer cannot fire, demote, or similarly punish a public employee for engaging in protected speech, the employer also cannot intimidate the employee into silence by threatening impermissible retribution.

Ridpath v. Board of Governors Marshall Univ., 447 F.3d 292, 319 (4th Cir. 2006); *see also Edwards v. City of Goldsboro*, 178 F.3d 231, 246 (4th Cir. 1999) ("a public employer is prohibited from threatening to discharge a public employee in an effort to chill that employee's rights under the First Amendment.").[2] Plaintiffs admit that "[a]lthough it is true that in both these [Fourth Circuit] cases, the defendants knew or anticipated that the plaintiffs would engage in future protected speech because of previous related protected speech which had been retaliated against by defendants, nothing in the Court of Appeal's rationale suggests that a defendant's knowledge of a plaintiff's

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[2] Plaintiffs have called their proposed derivative claim more than one name. In their proposed jury instructions, Plaintiffs labeled this claim a "First Amendment Intimidation Regarding Fields Case Testimony." (R. 887-3, Pls.' Proposed Jury Instruction #36.) At the hearing on the present motion, Plaintiffs called their claim an "anticipatory" claim based on "intimidation of future speech." (Hr'g Tr. Sept. 18, 2007.)

prior protected speech is a prerequisite for a First Amendment 'chilling claim.'" (R. 984-1, Pl.'s Mot. Recons., at 3.)

To establish a First Amendment retaliation claim, "a public employee must present evidence that: (1) his speech was constitutionally protected, (2) he has suffered a deprivation likely to deter free speech, and (3) his speech was at least a motivating factor in the employer's action." *Massey v. Johnson,* 457 F.3d 711, 716 (7th Cir. 2006) (citing *Spiegla v. Hull,* 371 F.3d 928, 935, 940-41 (7th Cir. 2004)). Meanwhile, although the Seventh Circuit has not recognized a separate, discrete claim for intimidation or chilling under the First Amendment, it recognizes that "harassment just as much as a formal discharge, may be actionable if it is designed to deter a public employee's free speech" and that "[g]overnment retaliation tends to chill an individual's exercise of his First Amendment rights."[3]

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[3] The Court notes that last year a Colorado federal district court rejected a plaintiff's First Amendment "chilling" claim:

> To the extent the Amended Complaint could be read to allege separate claims for retaliation and chilling, I note that the parties focus on retaliation in their written arguments on the motion to dismiss. Further, I observe that Spagnuolo has not pointed to any Tenth Circuit or Supreme Court law clearly establishing a chilling claim separate and apart from a public employee retaliation claim. *Cf. Ridpath v. Bd. of Governors Marshall University,* 447 F.3d 292, 319 (4th Cir. 2006) ("A chilling claim is essentially the derivative of a retaliation claim: if a public employer cannot fire, demote, or similarly punish a public employee for engaging in protected speech, the employer also cannot intimidate the employee into silence by threatening impermissible retribution").

Massey, 457 F.3d at 720; *see also Pickering v. Board of Educ.*, 391 U.S. 563, 574, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) ("threat of dismissal from public employment" is "a potent means of inhibiting speech"). Nevertheless, the Seventh Circuit has never recognized a First Amendment public employee claim – whether you call it retaliation or not – in which the plaintiff's protected speech need not precede a defendant's actionable conduct.

Although Plaintiffs argue that whether their protected speech comes before or after Defendants' retaliatory conduct is irrelevant, they rely on cases where the protected speech occurred before the defendant's actionable conduct in support of their theory.[4] Plaintiffs, for example, rely on *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982), in which the protected speech involved a public employee's allegation that she was reprimanded for endorsing a candidate for public office. More specifically, subsequent to the plaintiff's endorsement of a political candidate, the defendants allegedly pursued a campaign of petty harassments. *Id.* In analyzing the plaintiff's First Amendment claim, the Seventh Circuit stated:

Spagnuolo v. City of Longmont, Colo., No. 05 C 0729, 2006 WL 2594484, at *5 n.10 (D. Colo. Sept. 11, 2006).

[4] In the two unpublished Northern District of Illinois cases upon which Plaintiffs rely, the defendants reacted to plaintiffs' protected speech that occurred first. *See Munoz v. Chicago Sch. Reform*, 99 C 4723, 2000 WL 152138 (N.D. Ill. Feb. 4, 2000); *Klipfel v. ATF*, No. 94 C 6415, 1996 WL 566452 (N.D. Ill. Sept. 27, 1996).

> It is true that a certain air of the ridiculous hangs over the harassment allegations, in particular the allegation that we quoted earlier regarding the birthday cake. But we cannot say as a matter of law that the exercise of First Amendment rights by public employees cannot be deterred by subjecting employees who exercise them to harassment and ridicule through selective enforcement of work rules. The effect on freedom of speech may be small, but since there is no justification for harassing people for exercising their constitutional rights it need not be great in order to be actionable. Yet even in the field of constitutional torts *de minimis non curat lex*. Section 1983 is a tort statute. A tort to be actionable requires injury. It would trivialize the First Amendment to hold that harassment for exercising the right of free speech was always actionable no matter how unlikely to deter a person of ordinary firmness from that exercise that if the Mayor of Springfield had frowned at Miss Bart for running for public office he would be liable for damages (unprovable, of course) under section 1983. However, more is alleged here – an entire campaign of harassment which though trivial in detail may have been substantial in gross. It is a question of fact whether the campaign reached the threshold of actionability under section 1983.

Id. (internal citations omitted).

Here, the parties do not dispute that a campaign of harassment is actionable under the First Amendment as *Bart* instructs, and Plaintiffs certainly allege more

than petty or trivial harassing and intimidating conduct on the part of Defendants. *See Spiegla*, 371 F.3d at 941 ("a § 1983 case does not require an adverse employment action within the meaning of the antidiscrimination statutes, such as Title VII of the Civil Rights Act of 1964. Rather, "***[a]ny*** deprivation ... that is likely to deter the exercise of free speech ... is actionable.") (emphasis in original) (citations omitted). Nevertheless – as in the Fourth Circuit cases – the *Bart* plaintiff's protected speech occurred first after which the defendants reacted. *See id.; see also Andrekus v. Board of Educ. Dist. U-46*, 02 C 3960, 2004 WL 2535274, at *7 (N.D. Ill. Sept. 28, 2004) ("To establish First Amendment retaliation, a plaintiff must show that she engaged in constitutionally protected speech and that that speech was a substantial or motivating factor in the defendant's retaliatory action. By definition, the defendant's retaliatory actions must be in response to, *i.e.*, follow, the plaintiff's exercise of her constitutional rights.").

Plaintiffs also attempt to distinguish *Wernsing v. Thompson*, 423 F.3d 732 (7th Cir. 2005), which the Court relied upon in its in limine ruling. *See id.* at 752 ("plaintiffs are actually referring to speech which has not yet occurred, which, for First Amendment retaliation purposes, is no speech at all."). In *Wernsing*, employees at the Illinois Office of the Inspector General ("OIG") in the Department of Human Services ("DHS") sent two e-mails in November 2000 to the Inspector General, Odell Thompson, stating that they had concerns about the appointment of the OIG's Southern Bureau Chief and wanted to meet with Thompson. *Id.* at 737-38. Thompson did not respond to the plaintiffs' e-mails. *Id.* at 738. In December 2000, however, Thompson sent a

letter to the e-mail signatories that the OIG staff was not authorized to communicate about the office's polices or operations directly to the DHS Secretary, to the press, or to any external agent except with the Inspector General's approval and consent. *Id.* at 738. This directive was repeated in a second communication that Thompson sent to all OIG employees. *Id.* In January 2001, one of the plaintiffs called Thompson about the directives after which he yelled at her and told her she was "walking down the road to getting fired." *Id.* at 739. Thereafter, the Inspector General attended a meeting of the Southern Bureau staff where he met with the e-mail signatories and asked them about their concerns. *Id.* at 739. They explained their concerns about the appointment of an individual for the Southern Bureau Chief. *Id.*

The *Wernsing* plaintiffs alleged that on the heels of the e-mails and correspondence with Thompson, he committed several acts of retaliation for their inquiries and requests for a meeting. *Id.* In addition, the plaintiffs alleged a claim of unlawful prior restraint on speech based on Thompson's directive prohibiting unapproved discussions of OIG business. *Id.* at 740. The district court granted the plaintiffs' summary judgment motion on their prior restraint claim. *Id.* at 741. Furthermore, the district court denied the Inspector General's motion for summary judgment on the plaintiffs' retaliation claim concluding that the plaintiffs' e-mails to the Inspector General were constitutionally protected speech and there were material questions of fact remaining for trial whether the plaintiffs' protected speech was a motivating factor in the retaliatory conduct. *Id.* The district court also denied the Inspector General's qualified immunity claim concluding that it was clearly established that

Thompson's alleged actions restricting and retaliating against the plaintiffs' speech on matters of public concern violated the plaintiffs' constitutional rights. *Id.* Thereafter, the Inspector General appealed the qualified immunity ruling. *Id.*

On appeal, the Seventh Circuit held that the Inspector General was entitled to qualified immunity on the plaintiffs' prior restraint claim because "it was not clearly established, at the time the pre-clearance directive was first issued (December 5, 2000), that such a directive constituted an unlawful prior restraint on speech." *Id.* at 747. The *Wernsing* court reasoned that

> while the constitutional limits of restraints applicable to the general public are well-settled, and while the Supreme Court has struck down formal statutory bans of certain speech activity by government employees, the prerogatives of a government supervisor in managing the communications of his own staff are far less clear. We emphasize that our analysis of qualified immunity here is focused specifically and exclusively on this kind of relatively informal supervisory directive aimed at close subordinates.

Id. at 748 (internal citation omitted).

The *Wernsing* court then turned to the Inspector General's qualified immunity defense concerning the plaintiffs' First Amendment retaliation claim and addressed whether the plaintiffs had established a deprivation of a constitutional right. The court analyzed the plaintiffs' claims under the *Connick*-

Pickering test, concluding that the plaintiffs had failed to demonstrate that they engaged in speech on a matter of public concern. *Id.* at 751. Specifically, the Seventh Circuit concluded that because the plaintiffs' November 2000 e-mails did not articulate a particular viewpoint, grievance, or complaint – but instead just requested a meeting with the Inspector General – the e-mails did not constitute speech on a matter of public concern. *Id.* at 752. The *Wernsing* court further rejected the plaintiffs' argument that the court should consider the content of what the plaintiffs desired to communicate to the Inspector General, and that the court should focus its inquiry on the underlying speech that plaintiffs sought to bring to the Inspector General's attention, namely, their specific concerns involving the appointment of the Southern Bureau Chief. *Id.* The *Wernsing* panel reasoned:

> This line of argument is nonsensical. In their references to "underlying speech" that is "sought" to be expressed, plaintiffs are actually referring to speech which has not yet occurred, which, for First Amendment retaliation purposes, is no speech at all. This Court's precedents instruct that the ***content*** of the speech is the most important factor in determining the public concern element, not the inchoate intentions or views that the speaker privately holds.
>
> ...
>
> In the retaliation context, speakers simply may not invoke the protections of the First Amendment based on unexpressed viewpoints or un-uttered thoughts. Government officials are not mind readers. The fact that members of the OIG wanted to meet with the Inspector

> General about the rumored appointment of an unspecified person does not, by itself, constitute a matter of concern to the public.

Id. at 752-53 (internal citations omitted) (emphasis in original). The Seventh Circuit further noted that "otherwise unprotected speech does not suddenly attain protected status simply because it is animated by a viewpoint which, if actually expressed, might itself merit First Amendment protection." *Id.* at 752.

Although the content of Plaintiffs' speech is not at issue here, the *Wernsing* decision is instructive to this Court's analysis of Plaintiffs' argument that their unexpressed speech prior to Defendants' intimidating or retaliatory conduct constitutes a violation of the First Amendment. Simply put, this Court cannot ignore the Seventh Circuit's conclusion that for First Amendment retaliation purposes "speech which has not yet occurred ... is no speech at all." *Id.* at 752; *see, e.g., Gross v. Town of Cicero,* No. 03 C 9465, 2006 WL 288262, at *10 n.3 (N.D. Ill. Feb. 1, 2006) ("simply being named as a potential witness in the *Moreno* case would not constitute protected speech. *See Wernsing,* 423 F.3d at 752 (speech that has not occurred, 'for First Amendment retaliation purposes, is no speech at all.')"). Furthermore, Plaintiffs have not given this Court any compelling reason to ignore this precedent.

Plaintiffs also contend that *Wernsing* supports their derivative intimidation/chilling claim because "the Seventh Circuit recognized that a § 1983 action would lie if a public employee's future protected speech is chilled by governmental supervisors, characterizing such a claim as a 'prior restraint claim.'" (R. 984-1, Pls.' Mot. Recons., at 5.) At the hearing on this motion,

Plaintiffs' argued that *Wernsing* considered a "prior restraint harassment claim." (Hr'g. Tr. Sept. 18. 2007).

Plaintiffs' argument is misplaced for several reasons, especially because the language they rely upon concerns the Inspector General's argument on appeal "that plaintiffs lack standing to challenge his pre-clearance directive since they have not demonstrated any 'actual injury or any imminent threat of injury due to the directive.'" *Id.* at 743. More specifically, on appeal the Inspector General claimed that "in order to make out a concrete 'injury in fact' for standing purposes, plaintiffs must have sought permission to speak, been denied, spoken out anyway and been subject to discipline." *Id.* The Seventh Circuit rejected the Inspector General's argument – "the hypothetical chain of events outlined by Thompson describes a First Amendment retaliation case involving post-hoc punishment for disfavored speech, not a prior restraint which seeks to limit expressive activity before it occurs." *Id.*

First and foremost, the *Wernsing* decision did not characterize an action pertaining to a public employee's future protected speech as a "prior restraint harassment claim." Instead, the Seventh Circuit was analyzing the *Wernsing* plaintiffs' prior restraint speech claim based on the Inspector General's internal e-mails. As the court explained:

> We note at the outset that the plaintiffs, in challenging an internal e-mail as a "prior restraint" on speech, advance a somewhat unconventional claim. Prior restraints frequently arise in the form of judicial injunctions against certain types of speech (to

> which the collateral-bar rule applies), or, perhaps less commonly, in the form of formal statutes or regulations barring or constraining certain expressive activity. *But see Crue v. Aiken,* 370 F.3d 668, 679-80 (7th Cir. 2004) (characterizing a university president's internal pre-clearance directive, disseminated via e-mail, as a prior restraint on speech). Here, since both sides have used the phrase "prior restraint" in marshaling their arguments, we will also use that term. However, we offer no view as to whether, as a general proposition, an e-mail directive should always be analyzed in the same way as an injunction, statute or a formal regulation.

Id. at 743 n.3.

In addition, the *Wernsing* court's reference to the Inspector General's "hypothetical chain of events" describing "a First Amendment retaliation case involving post-hoc punishment for disfavored speech, not a prior restraint which seeks to limit expressive activity before it occurs" is dicta because this reasoning was not essential to the *Wernsing* court's decision. *See Tate v. Showboat Marina Casino P'ship,* 431 F.3d 580, 582 (7th Cir. 2005). As such, Plaintiffs' attempt to use this language to establish an intimidation/anticipatory claim is without merit.

Finally, the language in *Fairley v. Fermaint,* 482 F.3d 897 (7th Cir. 2007), supports the Court's conclusion that there is no legal basis for a intimidation/chilling claim where protected speech need not precede a defendant's actionable conduct. As the Seventh Circuit explained:

> Plaintiffs maintain, however, that defendants ***reacted adversely*** to two kinds of speech: not only statements made as part of their duties at work (the kind of speech to which *Garcetti* applies) but also to testimony that plaintiffs gave in inmates' suits. Assistance to prisoners and their lawyers in litigation is not part of a guard's official duties. To apply *Garcetti*, therefore, we would need to determine ***whether defendants reacted to plaintiffs' activities in litigation*** (they say not) and which of defendants' deeds can be traced to the litigation as opposed to events at work.

Id. at 902 (emphasis added). In short, the Seventh Circuit instructs that the relevant issue here is how Defendants reacted to Plaintiffs' protected speech – not how Defendants acted before Plaintiffs' protected speech.

Based on *Wernsing*, established First Amendment retaliation precedent, and the lack of authority supporting Plaintiffs' derivative intimidation claim, the Court denies Plaintiffs' motion for reconsideration because the Court did not commit a manifest error of law in its in limine ruling. *See Oto v. Metropolitan Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000) (manifest error of law is wholesale disregard, misapplication, or failure to recognize controlling precedent).

II. Motion to Stay & Certify Appeal

In the alternative, Plaintiffs request that the Court stay the trial scheduled to begin on October 9, 2007, and certify for appeal the question of "whether Section 1983 permits a cause of action for harassment and

intimidation in anticipation of and to discourage future speech protected by the First Amendment." (R.984-1, Pls.' Mot. Recons., at 9.)

Section 1292(b) provides that an interlocutory appeal may be taken if the underlying order "involves a controlling question of law as to which there is substantial ground for difference of opinion" and if "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). "Certification by the district court is a jurisdictional prerequisite to interlocutory review under § 1292(b)." *In re Ford Motor Co., Bridgestone/Firestone North American Tire, LLC,* 344 F.3d 648, 653 (7th Cir. 2003) ("both the district court and the court of appeals must agree that the case is a proper candidate for immediate review before the normal rule requiring a final judgment will be overridden."). "Interlocutory appeal is appropriate when (1) the appeal presents a question of law; (2) it is controlling; (3) it is contestable; (4) its resolution will expedite the resolution of the litigation, and (5) the petition to appeal is filed in the district court within a reasonable amount of time after entry of the order sought to be appealed." *Boim v. Quranic Literacy Inst. & Holy Land Found. For Relief,* 291 F.3d 1000, 1007 (7th Cir. 2002) (citing *Ahrenholz v. Board of Trs. of Univ. of Ill.*, 219 F.3d 674, 675-76 (7th Cir. 2000)). "Unless ***all*** these criteria are satisfied, the district court may not and should not certify its order to us for an immediate appeal under section 1292(b)." *Ahrenholz,* 219 F.3d at 676 (emphasis in original).

Here, there is no dispute that Plaintiffs' question that they seek to certify is a controlling question of law. *See Ahrenholz*, 219 F.3d at 676 (question of law

"has reference to a question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine"). In fact, Defendants offer their own questions for certification.[5] Defendants, however, contend that the *Wernsing* decision already resolved the relevant legal issue in this matter, thereby casting doubt on whether this legal issue is contestable as required under Section 1292(b).

"A question of law is contestable if there are substantial conflicting decisions regarding the claimed controlling issue of law, or the question is not settled by controlling authority and there is a substantial likelihood that the district court ruling will be reversed on appeal." *Calvin v. Sheriff of Will County,* No. 03 C 3086, 2006 WL 1005141, at *4 (N.D. Ill. Apr. 14, 2006); *see also Mannix v. Machnik,* No. 05 C 7232, 2006 WL 566447, at *3 (N.D. Ill. March 3, 2006) ("contested question of law," is defined as one creating a "substantial ground for difference of opinion.") (citing 28 U.S.C. § 1292(b)). As discussed in detail above, Plaintiffs have failed to present any case law – controlling or otherwise – that a public employee's protected speech under the First Amendment need not

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[5] Because Defendants have not filed a separate motion under Section 1292(b), the Court need not consider their questions for interlocutory appeal, especially in light of their bare-boned arguments in support of these questions. *Kochert v. Adagen Medical Int'l Inc,.* 491 F.3d 674, 679 (7th Cir. 2007) ("undeveloped arguments are waived"). Moreover, Defendants' second query involves a question of fact, and thus is not appropriate for interlocutory appeal under Section 1292(b). *See Ahrenholz,* 219 F.3d at 677 (appropriate question for interlocutory appeal is "something the court of appeals could decide quickly and cleanly without having to study the record").

precede Defendants' intimidating and retaliatory conduct, regardless of how the cause of action is labeled. Thus, there are no conflicting decisions regarding the controlling issue of law. Plaintiffs' reliance on the Fourth Circuit cases for a derivative retaliation claim – alone – does not make their question contestable, especially because controlling authority, *Wernsing v. Thompson,* 423 F.3d 732 (7th Cir. 2005), holds that for First Amendment retaliation purposes, speech which has yet to occur is no speech at all. *Id.* at 752. In other words, Plaintiffs have not established that there is a "substantial ground for difference of opinion" concerning the existence of a First Amendment chilling/intimidation claim that does not require a plaintiff's protected speech to precede a defendant's actionable conduct. Finally, under the circumstances, the Court cannot conclude that its decision likely will be reversed on appeal.

Because Plaintiffs have failed to satisfy the statutory requirement that the controlling legal issue is contestable, the Court need not address the other criteria under Section 1292(b). *See Ahrenholz,* 219 F.3d at 676. Accordingly, the Court denies Plaintiffs' motion to certify a legal question for interlocutory appeal.

III. Defendants' Motion for Reconsideration

In the alternative, Defendants request that the Court reconsider its April 16, 2007 order denying Defendants' Second Motion for Summary Judgment and its reconsideration order of May 7, 2007, based on Plaintiffs' concession that they did not engage in protected speech prior to the alleged acts of retaliation. Defendants, however, do not point to any transcript or part of the record where Plaintiffs allegedly made this

concession. Without more, the Court declines to revisit its earlier rulings as Defendants request.

CONCLUSION

For these reasons, the Court denies Plaintiffs' Motion for Reconsideration and Motion to Stay and Certify a Question of Law for Interlocutory Appeal.

Dated: September 24, 2007

ENTERED

/s/ Amy J. St. Eve
AMY J. ST. EVE
United States District Judge

APPENDIX C

Order Form (01/2005)

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Amy J. St. Eve	**Sitting Judge if Other than Assigned Judge**	
CASE NUMBER	03 C 5207	**DATE**	9/26/2007
CASE TITLE	Fairley vs. Andrews		

DOCKET ENTRY TEXT

In Court Hearing Held on 9/26/2007. Pursuant to RESPONSE [1011] by Plaintiffs Roger Fairley, Richard Gackowski to Defendants' Motion for Reconsideration of Denial of Defendants' Motion for Summary Judgment, is converted to a motion by Plaintiff do dismiss. Plaintiffs' motion is granted and judgment is entered in favor of Defendants. All pending motions [889] [938] [940] are denied as moot. Pretrial Conference set for 9/28/2007 is stricken. Jury Trial set for 10/9/2007 is stricken. Civil case terminated.

■[For further details see text below.]

Notices mailed by Judicial staff.
*Mail AO 450 form.

STATEMENT

Plaintiffs have filed a "response" to Defendants' motion for reconsideration of denial of Defendants' motion for summary judgment which, as noted in open court, is actually a motion to dismiss based on Plaintiffs' concession that they no longer can prove their case. In court, Plaintiffs' counsel conceded:

> "And the problem is that those are not the activities of which we have evidence that the defendants were aware. And, therefore, whether they were protected speech or not protected speech, there is a a causation problem that we cannot overcome. That's the reason why we come before you seeking this relief."

This concession is based on the Court's construction of *Garcetti v. Ceballos*, ___U.S. ___, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006), and the Court's refusal to recognize a cause of action based on an intimidation theory as set forth in the Court's September 24, 2007 Memorandum Opinion. (R. 1005-1; R. 1012-1 (corrected version)).

As stated in their filing, Plaintiffs contend that they are "left with no proper alternative than to concede that, in light and because of this Court's rulings, Defendants' Joint Motion for Summary Judgment based on *Garcetti* should be granted as to all Defendants." (R. 1011-1, Pls.' Resp., at 10.) Based on

Plaintiffs' admission, the Court grants hereby grants Plaintiffs' motion and enters judgment for Defendants.

APPENDIX D

AO 450(Rev. 5/85)Judgment in a Civil Case

United States District Court
Northern District of Illinois
Eastern Division

Case Number: 03 C 5207

[Filed September 26, 2007]

Fairley	)
	)
v.	)
	)
Andrews, et al	)
	)

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that In Court Hearing Held on 9/26/2007. Pursuant to RESPONSE [1011] by Plaintiffs Roger Fairley, Richard Gackowski to Defendants' Motion for

Reconsideration of Denial of Defendants' Motion for Summary Judgment, is converted to a motion by Plaintiff do dismiss. Plaintiffs' motion is granted and judgment is entered in favor of Defendants. All pending motions [889] [938] [940] are denied as moot. Pretrial Conference set for 9/28/2007 is stricken. Jury Trial set for 10/9/2007 is stricken. Civil case terminated.

Date: 9/26/2007

Michael W. Dobbins, Clerk of Court

/s/ Theresa Hammonds, Deputy Clerk

APPENDIX E

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

No. 07-3343

September 21, 2009

Before

FRANK H. EASTERBROOK, *Chief Judge*
RICHARD A. POSNER, *Circuit Judge*
DIANE P. WOOD, *Circuit Judge*

ROGER FAIRLEY and RICHARD GACKOWSKI, *Plaintiffs-Appellants*,	)
v.	)
DENNIS ANDREWS, *et al.*, *Defendants-Appellees*.	)

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 03 C 5207
Amy J. St. Eve, *Judge*.

Order

Defendants-appellees filed a petition for rehearing and rehearing en banc on September 3, 2009. No judge in regular active service has requested a vote on the petition for rehearing en banc,* and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

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* Judge Flaum and Judge Rovner did not participate in the consideration of this petition.